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No. 564

IN THE

Supreme Court of the United States

October Term, 1961

AMERADA PETROLEUM CORPORATION, *Petitioner*

VERSUS

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Amerada Petroleum Corporation (hereinafter sometimes called "Amerada") respectfully prays that a writ of certiorari be issued by this Honorable Court to review the decision of the United States Court of Appeals for the Tenth Circuit, rendered on July 24, 1961, which affirmed two orders of the Federal Power Commission (hereinafter sometimes called "Commission") rejecting notices of certain contractually authorized rate increases filed by Amerada and depriving Ame-

rada of the benefit of these increases for a period of ten months after they would otherwise have been effective.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in Appendix A hereto, is reported at 293 F. 2d 572. The orders of the Federal Power Commission (R. 880, 906) affirmed by the Court of Appeals are unreported. These orders are set forth in Appendix C hereto.

JURISDICTION

The decision of the Court of Appeals was rendered July 24, 1961. The jurisdiction of that Court was based on Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). Amerada timely filed a petition for rehearing which was denied by order of the Court of Appeals entered on August 24, 1961. Upon motion of Amerada, the issuance of a mandate was stayed until November 22, 1961, pending the filing of this petition for certiorari. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTION PRESENTED

The pivotal question presented by this petition is whether the Federal Power Commission has authority under the Natural Gas Act[1] to reject arbitrarily notices of contractually authorized rate changes solely because previous rate changes relating to the same sale are, at the time, temporarily suspended.

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[1] 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717 *et seq.*, and of the Commission's Regulations, 18 C.F.R. 1.1 *et seq.*, are set forth in Appendix D hereto.

STATEMENT OF THE CASE

Amerada Petroleum Corporation is an independent producer as that term is defined in Section 154.91 of the Commission's Regulations under the Natural Gas Act. It produces gas from the Permian Basin in Lea County, New Mexico, which it sells to El Paso Natural Gas Company (hereinafter called "El Paso") under nine gas sales contracts which Amerada has filed with the Commission as rate schedules pursuant to the requirements of Section 4(c) of the Natural Gas Act and Section 154.92 of the Commission's Regulations. (R. 1, 178, 229, 312, 370, 451, 533, 587, 630.) By operation of "favored nation" clauses in six of these rate schedules (R. 41, 191, 470, 547, 602, 645), Amerada became contractually entitled to an increased price (13.34802¢ per Mcf) for its gas effective October 1, 1959. By operation of similar provisions in the other three rate schedules (R. 278, 335, 410), Amerada became contractually entitled to the same increased price effective October 9, 1959.

On August 31, 1959, as to the former six rate schedules, and on September 8, 1959, as to the latter three rate schedules, pursuant to Section 4(d) of the Act and Section 154.92 of the Commission's Regulations, Amerada filed with the Commission notices of these contractually authorized rate changes. (R. 89, 207, 290, 350, 429, 506, 564, 609, 655). By orders

issued September 25, 1959 and October 7, 1959, the Commission, pursuant to Section 4(e) of the Act, suspended these rate increased until March 1, 1960 and March 9, 1960, and initiated proceedings concerning their lawfulness.(R. 750, 756).

On October 26, 1959, Amerada and El Paso renegotiated the nine gas sales contracts referred to above, eliminating the "favored nation" clauses contained in the original contracts and increasing the price to 15.5¢ per Mcf effective January 1, 1960. These renegotiated contracts were filed with the Commission on November 30, 1959 as supplements to the original nine rate schedules and as notices of the change in rates. (R. 96, 215, 298, 357, 437, 514, 572, 616, 662). The Commission accepted these filings and, by order issued December 18, 1959, suspended the rate increases until June 1, 1960, and initiated proceedings concerning their lawfulness. (R. 789).

On February 5, 1960, in four letter orders, the Commission advised Amerada that the filings of August 31, 1959 and September 8, 1959 were regarded by the Commission as superseded by those of November 30, 1959, and terminated as moot the proceedings initiated by its orders of September 25, 1959 and October 7, 1959. (R. 803, 804, 805, 806). On February 8, 1960 and February 23, 1960, Amerada filed motions to place in effect on March 1, 1960 and March 9, 1960, respectively, the increased rates filed August 31, 1959 and September 8, 1959. (R. 807, 814, 821, 828). On March 7, 1960, Amerada filed petitions for rehearing and reconsideration of the Commission's orders of February 5, 1960 on the ground that such orders deprived Amerada of the rate

creases filed on August 31, 1959 and September 8, 1959 for a period in excess of the five month statutory limit (R. 843, 850, 858, 866).

On April 5, 1960, the Commission issued its "Order Granting Rehearing and Disposing of the Issues There Raised," the validity of which was challenged by Amerada in Cause No. 6483 in the Court of Appeals (R. 880). In that order the Commission vacated its orders of February 5, 1960, and reinstated the proceedings which it had terminated by those orders. By the same order, the Commission rejected Amerada's filings of November 30, 1959 and terminated as moot the proceedings instituted by the Commission's order of December 18, 1959. The only basis stated by the Commission for this action was as follows:

> "With regard to suspension proceedings under the Natural Gas Act the Commission's general policy and interpretation has been that the rate in effect prior to the suspension period continues in effect and shall not be changed during the suspension period.
>
> "Amerada's November 30, 1959 filings proposed to change rates under suspension and, therefore, were subject to rejection. Instead of rejecting them, the Commission considered them as superseding the prior filings since such action was considered to be less onerous on Amerada. However, in view of Amerada's opposition to this action, and consistent with the Commission's general policy and interpretation under the Natural Gas Act, it is deemed necessary for the proper enforcement of the Act to rescind the Commission's prior permission to file the November 30, 1959, changes in rates and reject them without prejudice to their resubmittal; * * *." (R. 881).

On May 2, 1960, Amerada filed a petition for rehearing of the Commission's order of April 5, 1960 (R. 883), which was denied by the Commission on May 27, 1960. (R. 901). A petition for review of this order was filed in the Court of Appeals on July 25, 1960.

In order to minimize its possible loss, Amerada, on April 25, 1960, refiled the notices of rate change rejected by the Commission's order of April 5, 1960. (R. 96, 215, 298, 357, 437, 514, 572, 616, 662). In so doing, Amerada expressly reserved its right to attack the validity of that order and urged that the increased rates be allowed to become effective on June 1, 1960, five months after the effective date specified by the renegotiated contracts. Ignoring Amerada's request, the Commission, in a perfunctory order issued May 25, 1960, suspended the increased rate embodied in Amerada's refiled supplemental rate schedules until November 1, 1960, ten months after the effective date specified by contract (R. 906). Amerada challenged the validity of this order in Cause No. 6498 in the Court of Appeals. The petition for rehearing of this order, filed by Amerada on June 24, 1960, was denied by the Commission on July 21, 1960 (R. 912, 935). The petition for review of this order was filed in the Court of Appeals on August 11, 1960.

Upon review of the Commission's orders of April 5, 1960, and May 25, 1960, the Court of Appeals for the Tenth Circuit in an opinion by Judge Bratton, Judges Lewis and Breitenstein concurring, affirmed both orders. Rehearing was denied without further opinion.

REASONS WHY THE WRIT SHOULD ISSUE

The question presented by this petition is of great importance to the proper administration of the Natural Gas Act and is one that has not been previously decided by this Court. The Federal Power Commission, an administrative body possessing only those powers conferred by statute, has ignored the basic system of regulation established by the Natural Gas Act and has overstepped the bounds of its delegated authority by imposing substantive restrictions upon the rate-changing power of regulated natural gas companies not contained in or contemplated by the Natural Gas Act.

If the decision of the Court of Appeals affirming this flagrant assertion of undelegated power by the Commission is not reviewed and reversed by this Court, the freedom and flexibility built into the Natural Gas Act by Congress to enable natural gas companies to provide by individualized contractual arrangements for the revenues which prudent operation of their enterprises requires will be seriously and needlessly impaired. Under the authority asserted by the Commission in this case, a natural gas company may be arbitrarily deprived of contractually authorized rate increases absolutely necessary to recover its costs merely because the operation of prior rate increases is then suspended. The question here presented is, therefore, of great significance and should be decided by this Court.

Further, as will be shown hereafter, the decision of the Court of Appeals for the Tenth Circuit on this important issue is squarely in conflict with the decision of the Court of Appeals

for the District of Columbia in *Willmut Gas & Oil Company v. Federal Power Commission*, 294 F. 2d 245, issued July 20, 1961, just four days prior to the decision of the Court of Appeals in the case at bar (Appendix B). The unsuccessful party in the *Willmut* case, Willmut Gas and Oil Company, has previously filed a petition for certiorari in this Court, relying in part upon the conflict which exists between the decision in that case and the decision in the case at bar. Willmut's petition, designated Case No. 506, has not been acted upon by this Court.

In both *Willmut* and in the case at bar, it was argued that the Commission has authority to restrict in a manner not specified by the Act the power which natural gas companies have to change their rates. In *Willmut*, the restriction urged would bar notices of further increases while the lawfulness of prior increases is under investigation. In the instant case, the asserted restriction would bar notices of further increases while prior increases are suspended incident to an investigation of their lawfulness. In both cases, the restriction urged would summarily deprive natural gas companies of contractually authorized rate increases without a determination that such increases are unlawful. The *fundamental issue* in both cases is therefore the same. In *Willmut*, the Court of Appeals for the District of Columbia correctly refused to uphold the unauthorized restriction asserted. In the case at bar, the restriction imposed by the Commission was affirmed by the Court of Appeals for the Tenth Circuit. In order to reconcile this conflict between circuits on this important question,

it is urgent that certiorari be granted by this Honorable Court.

This Court has had occasion previously to analyze in detail rate-making and rate-changing procedures under the Natural Gas Act. *United Gas Pipe Line Company v. Memphis Light Gas and Water Division*[2], 358 U.S. 103 (1958); *United Gas Pipe Line Company v. Mobile Gas Service Company*[3], 350 U. S. 332 (1956). The Court is respectfully urged to refresh its recollection of those cases and to read once again those opinions in connection with this petition for certiorari. In those cases, this Court made it plain that the function of the Commission is not to *fix* rates, but is to *review* the lawfulness of rates which are established in the first instance by regulated natural gas companies. The Act is, therefore, not the *source* of the authority of natural gas companies to make and change rates, but merely specifies those *procedural* limitations upon the power to make and change rates possessed by natural gas companies in the absence of the Act which are necessary to effectuate the Commission's basic power of review. *Mobile.* Manifesting Congressional concern for "the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake," Section 4 of the Act provides for "the earliest effectuation of contractually authorized . . . rate changes consistent with appropriate Commission review." *Memphis.* In short, as this Court stated in *Mobile*, "except as *specifically* limited by the Act, the ratemaking powers of natural gas companies were to be no different than those they would possess in the absence of the Act."

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[2]Cited hereafter as "*Memphis*".
[3]Cited hereafter as "*Mobile*".

Pointing out that a regulated natural gas company "has the right in the first instance to change its rates *as it will*, unless it has undertaken by contract not to do so," this Court, in *Memphis*, spelled out the restrictions which the Act imposes upon rate changes:

> "The Act comes into play *only* in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review such changes, and (3) authorizing the Commission . . . to suspend the new rates for a five month period and thereafter to require the posting of a refund bond pending a determination of the lawfulness of the rates as changed." (Emphasis added.) 358 U. S. 113.

It is, thus, quite clear that the *only* restrictions upon rate changed under the Act are those *specified* in Sections 4(d) and 4(e) of the Act.

In rejecting notices of rate changes during periods of suspension of prior rate changes relating to the same sale, the Commission relied upon no *specific* restriction in the Act. Nor was the Court of Appeals in affirming the Commission's orders, able to point to any provision of the Act *specifically* imposing the restriction which the Commission has attempted to enforce. In affirming the orders of the Federal Power Commission challenged by Amerada, the Court of Appeals held that natural gas companies are "restricted by express or *implied* provisions in the Act" and purported to find in Section 4(d) of the Act an *implied restriction* supporting the action of the Commission. In Section 16 of the Act, the court found a Congressional grant to the Commission of broad and sweeping powers which the court construed as authorizing the

Commission's action in these cases. The Court of Appeals also based its decision upon administrative interpretation of the Act by the Commission.[4]

In finding an *implied* restriction upon rate changes in the Act, the Court of Appeals ignored the teaching of this Court in *Memphis* and *Mobile* that the *only* restrictions upon the power of natural gas companies to change rates are those *specified* in the Act. From the rationale of *Memphis* and *Mobile*, it necessarily follows that the Act contains *no implied restrictions upon rate changes*. This Court has made it quite clear in a recent decision that the authority of an administrative body specified by statute "should not be modified by resort to such generalities as 'administrative and flexibility' and 'implied powers' " and that administrative bodies may not "rely on their own notions of implied powers in the enabling act " *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U. S. 316 (1961).

Further, the restrictions *specified* in the Act are all that are necessary for the Commission to discharge its basic statutory function of rate *review*. Rejection of rate changes when prior changes relating to the same sales are suspended is in no way necessary to the proper review by the Commission of the lawfulness of rate changes. *Each rate change* must be preceded by thirty days' notice to the Commission and may be suspended for five months pending a hearing concerning its lawfulness. *Each rate change* involving an increased rate is subject to the Commission's power to require a refund of any portion thereof found not justified. No reason was offered by

[4]The Court of Appeals cited Sections 2.4(f) and 2.52 of the Commission's Regulations set out in Appendix D hereto.

the Commission for the restriction it imposed; no relationship to its statutory function was suggested. Nor did the Court of Appeals in finding implied authority in the Act for such a restriction point to any such reason or relationship.

There is, therefore, absolutely no basis in law for *implying* authority in the Federal Power Commission to apply restrictions which do not have, and which are not even represented to have, any reasonable relationship to the powers, duties and functions specifically conferred upon it by the Natural Gas Act. If authority is to be given the Commission by implication, it can only be that authority which is "*reasonably necessary*" and "*fairly appropriate*" to effect its specified powers and functions. See, *e. g., Colorado Interstate Gas Company v. Federal Power Commission*, 142 F. 2d 943 (10th Cir. 1944), aff'd. 324 U.S. 581. It is made clear in *Mobile* that the Act only "imposes such duties on natural gas companies *as are necessary to effectuate*" the Commission's basic review powers. The restriction which the Commission has imposed on making rate changes has *no relationship* to its basic power of review and is, thus, wholly arbitrary. It is the function of the Federal Power Commission to review the lawfulness of Amerada's rates, not to arbitrarily deprive Amerada of revenues for reasons having no relationship to that function.

Without being very specific as to the language it was relying on, the Court of Appeals found in Section 4(d) of the Act "a clear token of Congressional implication" supporting the restriction of rate changes which the Commission

has attempted to enforce in the cases at bar. Section 4(d) of the Act is set out in full in Appendix D hereto. This Honorable Court is urged to give this section of the Act, as well as Sections 4(c) and 4(e), immediately preceding and following Section 4(d), close scrutiny. A careful reading will make it clear that Section 4(d) provides no support for an implied restriction on rate changes, assuming, *arguendo*, that implication of such restrictions were proper under the Act.

Section 4(c) requires that natural gas companies file with the Commission schedules showing all rates and charges for any sale subject to the jurisdiction of the Commission. Section 4(d) provides that, unless the Commission otherwise orders, no change shall be made in "any such rate" except after thirty days notice to the Commission and to the public. This Court made it plain in *Mobile* that the phrase "any such rate" means any rate on file with the Commission pursuant to Section 4(c). Having expressly imposed a thirty-day notice requirement upon the making of rate changes, Section 4(d) specifies *how* that notice shall be given, *viz.* by filing with the Commission "new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect."

The Commission and, apparently, the Court of Appeals rely heavily upon the phrase "schedules then in force" to show an implied restriction upon rate changes during a period when prior rate changes are suspended. However, as this Court will note, the only possible meaning which an ordinary, logical

reading of Section 4(d) permits to be given the phrase "schedules then in force" is rate schedules on file with the Commission pursuant to the requirement of Section 4(c). It is neither reasonable or necessary to give this portion of the Act any other meaning. This reading of Section 4(d) is in accord with the scheme of regulation established by the Act. No reason for torturing the clear language of this part of the Act is suggested by the Commission or by the Court of Appeals. There is, therefore, no basis for this Court to give Section 4(d) anything but its plain meaning. See, *Border Pipe Line Co. v. Federal Power Commission*, 171 F. 2d 149 (D.C. Cir. 1948). Thus, under the Act (1) natural gas companies are subject only to the *specific* restrictions which Section 4 imposes upon their rate-changing powers, (2) there is no reason, and, hence, no basis in law for *implying* a restriction in Section 4(d) of the Act upon making rate changes when prior changes are suspended and (3) the language of Section 4, given its natural meaning, does not support the implication of such a restriction.

In direct conflict with the holding of the Court of Appeals below, the Court of Appeals for the District of Columbia in *Willmut*, decided just four days earlier, correctly construed the rate-changing procedures of the Act in accordance with the teaching of this Court in *Mobile*, and *Memphis* and refused to read into the Act restrictions on rate changes not specified therein. Noting that the "rate-making and rate-changing power" of natural gas companies "is not affected by the Natural Gas Act," the court in *Willmut*, in an opinion written by Chief Judge Wilbur K. Miller, Judges Fahy and Burger concurring, said:

> "Section 4(d) of the Act does not give the Commission discretion to *reject* schedules of increased rates tendered by a natural gas company; on the contrary, Section 4(d) *requires* that new schedules be filed with the Commission when notice of a rate change is given. The Commission's power with respect to a filed increase is found in Section 4(e): to initiate a hearing as to the lawfulness of the changed rates, to suspend their effectiveness for a time, and to order refunded that portion of the increase which, after hearing, it determines to be unlawful. Thus the Act provides for investigation of changed rates which have been filed; *but it does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates, or that it may summarily reject or disallow the new schedule without a hearing.*" (Emphasis added.) 294 F. 2d 248-249

It was argued in *Willmut* that the filing of successive rate increases while prior increases were still under investigation caused the Commission to lose jurisdiction of the prior increases and required that such increases be refunded. The court, however, found no authority in the Act for such a proposition and refused to resort to implication:

> "We find nothing in the Act or in the decisions which authorizes the Commission to disclaim further jurisdiction in a pending Section 4(e) hearing because another rate increase was filed during its pendency. *And we are unwilling to hold, in the absence of controlling judicial precedent or express statutory provision requiring us to do so, that increased rates which are the subject of unfinished hearings under Section 4(e) must or may be summarily disallowed because the natural gas company files a schedule of new increases.*"
> (Emphasis added.) 294 F 2d 249.

The decision in *Willmut* is in harmony with the decisions of this Honorable Court in *Memphis* and *Mobile*; it is squarely contrary to the decision of the court below in the case at bar. *Willmut* finds further support in *Mississippi River Fuel Corporation v. Federal Power Commission*, 202 F. 2d 899 (3rd Cir. 1953). In that case, the court noted the limits on the power of the Commission upon the filing by a natural gas company of a changed rate:

> "On the face of Section 4 of the Natural Gas Act, . . . it is clear that, Mississippi's proposed tariff changes having been duly filed, *the Commission had only two alternatives.* By failing to act it could have allowed them to become effective, or, it could have entered upon a hearing and, pending such hearing, could have suspended the proposed new schedules for a period not exceeding five months beyond the proposed effective date. It did neither of these things. *It purported to follow a third course, rejection without a hearing — a course for which it cannot show even color of statutory authority.*" (Emphasis added.) 202 F. 2d 902.

The reliance by the Court of Appeals in the case at bar upon Section 16 of the Act to support the restriction imposed by the Commission is also clearly erroneous and is in diametric conflict with the holding in *Willmut* on this point. Section 16 gives the Commission broad *administrative* powers. Thus, the Commission may "perform any and all acts, . . . prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find *necessary* or *appropriate to carry out the provisions of this Act.*" (Emphasis added.) Manifestly, this is not an *unlimited* grant of power. Action taken pursuant to Section 16 may not be arbitrary, but must have

some *reasonable relationship* to the Commission's basic authority under the Act. See, *e.g., Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U. S. 129, 134-135 (1936); *Review Committee v. Willey*, 275 F. 2d 264, 272 (8th Cir. 1960), cert. denied 363 U. S. 827. And "a regulation or ruling which creates a rule out of harmony with the statute is a nullity." *Manhattan General Equipment Company v. Commissioner of Internal Revenue, supra*; *U. S. v. Eddy Brothers, Inc.*, 291 F. 2d 529, 531 (8th Cir. 1961). Here, as shown above, the restriction imposed is not in harmony with the Act, has *no relationship* to the basic authority of the Commission and is wholly arbitrary.

It was obviously the purpose of Congress in enacting Section 16 to allow the Commission to prescribe *forms* and *procedures* "necessary or appropriate" to implement its specified statutory functions. See, *Atlantic Seaboard Corporation v. Federal Power Commission*, 201 F. 2d 568 (4th Cir. 1953); *Mississippi River Fuel Corporation v. Federal Power Commission, supra*. Section 16 is not, however, and could not validly be a delegation to the Commission of unfettered legislative power. It furnishes no authority for imposing a *substantive* restriction on rate changes not specifically authorized by the Act. See, *Mississippi River Fuel Corporation v. Federal Power Commission, supra*.

In *Willmut*, the court correctly *restricted* the scope of Section 16 of the Act. Noting that this part of the Act "speaks in broad and general terms," the court said:

"But *the broad power granted by this statutory*

language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d) *of the Act that it notify the Commission of the changes,* so that it may proceed under Section 4(e).

* * *

"An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation . . . would deny to (the company) the right to change rates at which it offers service, *which the Mobile decision says is the right of a natural gas company.* Thus, it seems clear that *such an order or regulation would amount to a legislative change which is beyond the authority of the Commission.*" (Emphasis added.) 294 F. 2d 250.

The Court of Appeals was also mistaken in relying upon administrative interpretation to support the Commission's action in these cases. It is an elementary legal axiom that an administrative body cannot by administrative interpretation or otherwise enlarge its own statutory authority. *E.g., Social Security Board v. Nierotko,* 327 U. S. 358, 369 (1946); *Signal Oil and Gas Company v. Federal Power Commission,* 238 F. 2d 771, 774 (3rd Cir. 1956). But this is precisely what the Commission has attempted to do in rejecting notices of rate changes during a period when prior rate changes relating to the same sale are suspended. It is plain that the Act imposes *no* restrictions upon the making of rate changes other than those *specified* and that the restriction which the Commission would impose is *not specified.* The Commission's

interpretation to the contrary, no matter how long-standing, is erroneous and cannot override the clear language of the Act. As this Court has succinctly observed, "even consistent error is still error." *Phillips Petroleum Corporation v. State of Wisconsin*, 347 U. S. 672, 678, n. 5 (1954).

CONCLUSION

In summary, the opinion of the Court of Appeals for the Tenth Circuit erroneously decided a question of great importance to the proper administration of the Natural Gas Act. The decision is squarely in conflict with the decision of the Court of Appeals for the District of Columbia in the *Willmut* case and is in conflict with the rationale of this Court in *Memphis* and *Mobile*. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH DISTRICT

JUNE TERM, 1961

No. 6483

AMERADA PETROLEUM CORPORATION,
Petitioner,
v.
FEDERAL POWER COMMISSION,
Respondent.

No. 6498

AMERADA PETROLEUM CORPORATION,
Petitioner,
v.
FEDERAL POWER COMMISSION,
Respondent.

ON PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

(Decided July 24, 1961)

N. Kenneth Scott, Jr., (Robert J. Stanton, Joseph W. Morris, and John S. Miller were with him on the brief) for Petitioner.

John D. Lane (John C. Mason, General Counsel; Howard E. Wahrenbrock, Solicitor; and Luke R. Lamb, Assistant General Counsel, were with him on the brief) for Respondent.

Before BRATTON, LEWIS and BREITENSTEIN, Circuit Judges.

BRATTON, Circuit Judge:

Section 4(c) of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. §717 et seq., requires natural gas companies subject to regulation to file with the Federal Power Commission schedules of rates and all contracts which in any manner affect or relate to rates. Section 4(d) provides that unless the Commission orders otherwise, no change in rates shall be made except after thirty days' notice to the Commission, the notice stating the change or changes to be made in the schedule or schedules then in force and the time when such change or changes will go into effect. Except in cases of industrial rates, section 4(e) empowers the Commission to suspend new schedules for a period of not more than five months beyond the time they otherwise would go into effect pending a determination of their reasonableness. The section further provides that if the Commission has not reached a decision before the period of suspension has expired, the filed rate shall on motion of the natural gas company go into effect. Section 5(a) vests in the Commission power, after a hearing, to modify rates which it determines are unjust, unreasonable, unduly discriminatory, or preferential. Section 16 grants to the Commission power to perform any and all acts and make such rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act. And section 19(b) makes provision for judicial review of orders issued by the Commission.

Amerada Petroleum Corporation, a producer of natural gas, is subject to regulation under the Act. It sold gas to El Paso Natural Gas under nine sales contracts which it filed with the Commission as rate schedules. The contracts each contained a favored nation provision. By virtue of such provisions, El Paso Natural became obligated to increase its payments for gas under six of such contracts, effective October 1, 1959; and by virtue of like provisions, El Paso became obligated to increase its payments under the other three contracts,

effective October 9, 1959. On August 31, 1959, Amerada filed with the Commission notices of change in rates under the six contracts; and on September 8, it filed like notices of change under the three contracts. By orders issued September 25 and October 7, 1959, the Commission suspended these rate changes, respectively, until March 1 and March 9, 1960, respectively. On October 26, 1959, Amerada and El Paso Natural renegotiated the nine contracts. The renegotiated contracts fixed the sales price of gas at a figure in excess of that specified in the original contracts and the increase under the favored nations provisions combined. On November 30, the renegotiated contracts were filed with the Commission as supplements to the original rate schedules and as notices of change in rates. By order issued December 18, 1959, the Commission accepted the filings and suspended the rate increases until June 1, 1960. On February 5, 1960, the Commission advised Amerada by letters that the filings of August 31 and September 8, 1959, were regarded by the Commission as superseded by those of November 30, 1959, and, therefore, the former proceedings were terminated as moot. Amerada filed motions to place in effect on March 1 and March 9, 1960, respectively, the increases of which notice had been given in August and September. On March 7, it filed petitions for rehearing and reconsideration of the letter orders of February 5, 1960. On April 5, 1960, the Commission issued its order granting the petitions for rehearing, vacating the letter orders, reinstating the August and September, 1959, filings, and rescinding permission to file the rate changes tendered on November 30, 1959. On April 25, 1960, Amerada refiled the supplemental rate schedules which the Commission rejected by its order of April 5, 1960. By order dated May 25, the Commission suspended until November 1, 1960, use of the increase in rates embodied in the refiled supplemental schedules. And by petitions under section 19(b) of the Act, Amerada brought here for review the orders of the Commission of February 5 [*sic*] and May 25, 1960.

Except as restricted by express or implied provisions in the Act, natural gas companies possess the same freedom

in respect to the making of rates that they would have in the absence of the Act. The Act does not purport to grant to or take from natural gas companies their power to make rates initially, by contract or otherwise, subject to rejection or modification upon a finding of the Commission that they are unlawful. Considered as a whole, the Act establishes a comprehensive statutory scheme under which rates are established initially by action of natural gas companies with the Commission exercising powers of review. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332. And natural gas companies are free to effectuate changes in rates from time to time, but they are subject to procedures and limitations of the Act. United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103.

The order of April 5, 1960, is attacked on the ground that the Commission did not have authority to reject the notices of change in rates because the changes were to be made during the period when prior rate changes relating to the same gas were suspended. Pinpointing, the substance of the challenge is that the Act contains no restriction upon making rate changes during periods when prior rate changes relating to the same gas are suspended. The order stated that the Commission's general policy and interpretation of the Act had been that a rate in effect prior to the suspension continues in effect during the suspension period and shall not be changed during such period. It was further stated that the November 30, 1959, filings proposed to change rates under suspension and, therefore, were subject to rejection. It was further stated that since such action was considered less onerous to Amerada, the Commission considered the changes as superseding the prior filings. And it was further stated that, in view of Amerada's opposition to such action, and consistent with the Commission's general policy and interpretation of the Act, it was deemed necessary and proper for the enforcement of the Act to rescind the Commission's prior permission to file the November 30, 1959, changes and reject them without prejudice to their resubmittal; to vacate the letter orders dated February

5, 1960; to reinstate the suspension proceedings, and to reinstate the supplements tendered for filings on August 31, 1959, and September 8, 1959. Section 4(d) of the Act concerns itself with the making of changes in rates. It forbids the making of changes without notice thereof being given to the Commission for at least thirty days before such changed rates are to go into effect. And it provides that the notice shall state the change or changes to be made in the schedule or schedules "then in force" and the time at which the changed rates shall go into effect. Considered as a whole, the section bears a clear token of Congressional implication that the power of a natural gas company to make a change or changes in rates is limited to the rate or rates in force and effect at the time of the change or changes. Moreover, by section 16 of the Act, the Commission is expressly vested with power "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders as it may find necessary or appropriate to carry out the provisions of this Act." Manifestly, that is a sweeping grant of administrative authority to be exercised in the sound discretion of the Commission. In the exercise of such power, the Commission has consistently declared its policy and interpretation of the Act to be that during the suspension of a rate, the prior existing rate schedule continues in effect and shall not be changed. 18 CFR §§2.4(f) and 2.52, page 37. Congress has not taken steps directly or indirectly disapproving such policy and interpretation. And that administrative interpretation is to be accorded appropriate consideration in arriving at a judicial construction of the Act. Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U. S. 137, 154. Considering the statute and the regulations together, we entertain no doubt that the Commission was clothed with authority to enter the order of April 5, 1960.

The order of May 25, 1960, is challenged on the ground that its effect was to suspend Amerada's rate changes for a period in excess of the statutory limit of five months from the time they otherwise would have gone into effect with a

resulting loss in revenue to Amerada during such excess. The contention is based upon the premise that it was of no moment that the first increases were suspended at the time the second increases were to become effective. That which has been said makes obvious that the premise is without sustainable foundation. The effective date of changed rates after suspension has reference to a valid filing. The period has no reference to the filing of an invalid change.

The orders of the Commission are severally

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,775

WILLMUT GAS & OIL COMPANY,
Petitioner
v.
FEDERAL POWER COMMISSION,
Respondent
UNITED GAS PIPE LINE COMPANY,
Intervenor

Petition for Review of Order of the
Federal Power Commission

Decided July 20, 1961

Mr. Bryce Rea, Jr., with whom *Mr. Thomas M. Knebel* was on the brief, for petitioner.

Mr. Milton J. Grossman, Attorney, Federal Power Commission, with whom *Messrs. John C. Mason*, General Counsel, Federal Power Commission, and *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, were on the brief, for respondent.

Mr. Thomas Fletcher, with whom *Mr. C. Huffman Lewis* was on the brief, for intervenor.

Before WILBUR K. MILLER, *Chief Justice*, and FAHY and BURGER, *Circuit Judges*.

WILBUR K. MILLER, *Chief Judge*: At rates it established *ex parte*, and filed with the Federal Power Commission,

United Gas Pipe Line Company, a wholesaler, has for some years sold to Willmut Gas and Oil Company, a local distributor in Hattiesburg, Mississippi, all the natural gas required by the latter for resale. It does not appear that United has contracted with Willmut not to change the rates applicable to its purchases.

On September 30, 1955, United increased its tariffs under which Willmut was buying gas and, as required by Section 4(d) of the Natural Gas Act,[1] notified the Commission of the changes made. Acting under Section 4(e) of the Act,[2] the Commission suspended for five months the effectiveness of the increases[3] and ordered a hearing as to whether they were lawful. The hearing had not been completed at the end of the five-month period, so the increase was made effective, subject to a refunding bond.

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[1]Section 4(d) of the Act, 52 STAT. 822 (1938), 15 U. S. C. §717c(d), is as follows:

"Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

[2]Section 4(e) of the Act, 52 STAT. 822 (1938), 15 U. S. C. §717c(e), is in pertinent part as follows:

"Whenever any such new schedule is filed the Com-

mission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearing, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission . . . and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified . . ."

[3]Except industrial rates, which are not subject to suspension.

On May 15, 1956, United filed a second rate increase which the Commission suspended and set for hearing. The trial examiner on April 5, 1960, issued a decision as to the filings of September 30, 1955, and May 15, 1956, which the Commission adopted, with modification, on January 4, 1961.[4]

After the two filings above referred to, United filed four additional increases: on May 29, 1957, May 29, 1958, March 30, 1959, and February 11, 1960.[5] Each was suspended and set for hearing, and presumably each became effective five months after suspension, subject to undertakings for refunds. Before a hearing on the February 11, 1960, filing had been ordered, Willmut moved the Commission to reject it in order "to prevent the destruction of its jurisdiction to entertain" the pending proceedings involving earlier increases. Willmut also moved that, if the Commission accepted for filing the February 11, 1960, schedules, it deny the increases contained in the preceding filings then under investigation, and order United to refund all sums collected thereunder.

The order suspending and directing a hearing on the lawfulness of the latest increased rates was issued March 10, 1960. In a footnote to this order, the Commission noted that Willmut "has filed a petition to reject the instant proposed filing, or, in the alternative, to disallow pending undecided rate review proceedings," and noted further that United had filed an answer thereto. But the Commission did not expressly rule on Willmut's motions; inferentially it denied them by

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[4]The delay was caused by intervening litigation which culminated with the decision of the Supreme Court in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U. S. 103 (1958).

[5]A still later increase, made December 15, 1960, is not involved here. That of February 11, 1960, will be referred to hereinafter as the latest.

accepting United's latest filing and failing to disallow and order refunded the previous increases involved in the undecided cases.

Its petition for rehearing having been denied by the Commission, Willmut petitioned for judicial review of the order of March 10, 1960, making these contentions:

(1) That the Commission had no authority under the Act to permit United to file or make effective increased rates superseding previously filed increased rates which were being investigated; that the Commission's duty was either to reject the filing of February 11, 1960, or to accept it and at the same time to disallow previously filed increases and order refunds with respect thereto;

(2) That the Commission abused its discretion in accepting for filing United's latest rate increases; that it should have exercised its power under Section 16 of the Act to order maintenance of the *status quo* during the entire period of investigation, which could have authorized rejection of the new schedules;

(3) That the Commission erred in not rejecting the latest filing on the ground it showed on its face that the increased rates fixed therein were unlawfully discriminatory and preferential.

There may be doubt as to whether Willmut, which did not become a party to the proceeding to investigate United's new rates until after its petition for review had been filed in this court, can obtain review of an order entered before its intervention; or whether it can be said that this order, which merely initiated the proceedings, can correctly be called "an order issued by the Commission in such proceeding" which will be judicially reviewed at the petition of a party aggrieved thereby; or whether Willmut was aggrieved by the order,

which in direct terms did no more than suspend and direct a hearing concerning the changed rates of which Willmut complains. *Cf.* Section 19(b) of the Natural Gas Act, 52 STAT. 831 (1938), 15 U. S. C. § 717r(b). But, as these questions were not suggested by the opposing parties — except that the aggrievement question was mentioned but not pressed — we resolve any such doubt in Willmut's favor, and proceed to consider the reasons it advances for reversal of the order of March 10, 1960.

Willmut's first point, that the Commission had no authority to permit United to file or make effective increased rates superseding previously filed increased rates which were then still under investigation, is not well taken. Under its rate-making and rate-changing power, which we shall show is not affected by the Natural Gas Act, United could change at will the rates offered to customers, since it had established them *ex parte* and not by contract. Moreover, Section 4(d) of the Act does not give the Commission discretion to reject schedules of increased rates tendered by a natural gas company; on the contrary, Section 4(d) requires that new schedules be filed with the Commission when notice of a rate change is given. The Commission's power with respect to a filed increase is found in Section 4(e): to initiate a hearing as to the lawfulness of the changed rates, to suspend their effectiveness for a time, and to order refunded that portion of the increase which, after hearing, it determines to be unlawful. Thus the Act provides for investigation of changed rates which have been filed; but it does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates, or that it may summarily reject or disallow the new schedule without a hearing.

The petitioner argues that the filing of new rates, which supersede earlier increases already under investigation, destroys the Commission's jurisdiction to continue its inquiry into the lawfulness of the previous increases, because the

filing of superseding rates converts those which are superseded into past rates concerning which the Commission has no authority.

If this were true, a natural gas company whose newly-increased rates were being investigated by the Commission could render them immune from further scrutiny by the simple expedient of filing another increase. To avoid this result of its argument, which obviously it does not desire, Willmut contends that, if a new filing for increased rates is accepted, the Commission "must dismiss the pending proceedings [which are hearings concerning the lawfulness of previous increases] for lack of jurisdiction to entertain them, disallow the rates at issue therein, and order refund of all amounts collected by virtue of them."

Willmut thus suggests an incongruous procedure: that jurisdiction be disclaimed with reference to earlier increases, but that nevertheless it be exercised by disallowing the rates fixed in the previous filings, and ordering refunds. We find nothing in the Act or in the decisions which authorizes the Commission to disclaim further jurisdiction in a pending Section 4(e) hearing because another rate increase was filed during its pendency. And we are unwilling to hold, in the absence of controlling judicial precedent or express statutory provision requiring us to do so, that increased rates which are the subject of unfinished hearings under Section 4(e) must or may be summarily disallowed because the natural gas company files a schedule of new increases.

On the contrary, we hold that, when the commission orders suspension of and a hearing with respect to increased rates, its jurisdiction to investigate the lawfulness of the increase is not lost merely because the natural gas company later files for a still larger increase. In such circumstances, the Commission has authority to continue its investigation as to whether the rates previously filed were lawful for the period

from the date of filing until they were superseded by a later filing, and to order a refund of the amounts collected during that period which it thereafter determines to have been unlawful. From this it follows that the Commission did not err in permitting United to file and make effective the increases of February 11, 1960, even though that filing superseded earlier and smaller increases which were still under investigation.

We turn to consider the petitioner's second point: that the Commission abused its discretion in accepting for filing the increased rates tendered on February 11, 1960. On this point, Willmut's theory appears to be that the Commission erred in failing to issue orders under Section 16 of the Act which would "prevent Section 4 of the Act from being used as a vehicle for piling increase upon increase with such frequency and regularity as to foreclose any hope of either fixing lawful rates for the present and future or giving any rate stability." Had the Commission issued such preventive orders under Section 16, says Willmut, it would have been justified by them in rejecting United's latest filing.

In considering this contention, it is necessary to determine whether Section 16 of the Act authorizes the Commission to enter an order or adopt a rule or regulation which would permit it, in some circumstances, to refuse to receive for filing a new schedule showing changes in rates tendered by a natural gas company pursuant to the mandate of Section 4(d).

Section 16 of the Act speaks in broad and general terms: it provides, *inter alia,* that "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act." But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirement of Section 4(d)

of the Act that it notify the Commission of the changes, so that it may proceed under Section 4(e). As the Supreme Court said in the *Mobile* opinion,[6] "The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act." An order or regulation requiring the rejection of increased rates because earlier increases were still under investigation, which Willmut suggests, would deny to United the right to change rates at which it offers service, which the *Mobile* decision says is the right of a natural gas company. Thus, it seems clear that such an order or regulation would amount to a legislative change which is beyond the authority of the Commission.

Willmut's suggestion that United has used Section 4 of the Act "as a vehicle for piling increase upon increase" mistakes the nature and purpose of that section of the statute. The "vehicle" which United has used is one of its own inherent rate-making and rate-changing powers which the Supreme Court has said exists unaffected by the Natural Gas Act, and has described as the power "to establish *ex parte*, and change at will, the rates offered to prospective customers." The Supreme Court went on to say, ". . . [Section] 4(d) means simply that *no* change — neither a unilateral change to an *ex parte* rate nor an agreed-upon change to a contract — can be made by a natural gas company without the proper notice to the Commission."[7]

It may be that, under its power to change at will the rates which it established *ex parte* and offered to prospective customers, United has been "piling increase upon increase", with results which Willmut finds oppressive and thinks unreasonable and unlawful. But Section 4(d) does not forbid such successive filings; it merely requires that notice thereof

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[6]United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332, 343 (1956).

[7]*Ibid.*

be given to the Commission so it may investigate their lawfulness. So, if "piling increase upon increase" is to be forbidden, legislation to that effect must be adopted.

We are not impressed by Willmut's argument on its third point, that the Commission erred in not rejecting the latest filing as being unlawfully discriminatory and preferential on its face. As we have seen, a natural gas company has the duty imposed by Section 4(d) to file with the Commission new schedules reflecting changes in rates. The Commission was not authorized to reject the filing in this case on any ground appearing on its face. Its only statutory authority was to enter upon a hearing concerning the lawfulness of such rates, to suspend their effectiveness for a time, and after full hearing to make such orders with reference thereto as would be proper in a proceeding under Section 5(a) of the Act.[8]

For the reasons given, we uphold the Commission's order.

Affirmed.

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[8]Section 5(a), 52 STAT. 823 (1938), 15 U. S. C. §717d(a), is as follows:

> "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed

and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole and Arthur Kline.

	Docket Nos.
Amerada Petroleum Corporation	G-19488, G-19577 and G-20390
Amerada Petroleum Corporation, *et al.*	G-19489 and G-20391
Amerada Petroleum Corporation (Operator), *et al.*	G-19490 and G-20392[1]

ORDER GRANTING REHEARING AND DISPOSING OF ISSUES THEREIN RAISED

(Issued April 5, 1960)

On August 31, 1959 and September 8, 1959, Amerada Petroleum Corporation (Amerada)[2] tendered for filing certain proposed changes in rates reflecting favored-nation increases, for jurisdictional sales of natural gas to El Paso Natural Gas Company. These proposed changes were designated and suspended by Commission order as follows:

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[1] This order does not provide for the consolidation for hearing or disposition of the several matters covered herein, nor should it be so construed.

[2] Amerada also refers, wherever used herein, to the Respondents designated as Amerada Petroleum Corporation, *et al.* and Amerada Petroleum Corporation (Operator), *et al.*

Docket No.	Rate Schedule No.	Supplement No.	Date Filed	Suspended to Date	Suspended Days
G-19488	1	21	8-31-59	9-25-59	5-1-60
G-19488	62	4	8-31-59	9-25-59	5-1-60
G-19488	69	1	8-31-59	9-25-59	5-1-60
G-19488	72	2	8-31-59	9-25-59	5-1-60
G-19489	27	5	8-31-59	9-25-59	5-1-60
G-19490	57	3	8-31-59	9-25-59	5-1-60
G-19577	51	6	9-8-59	10-7-59	5-9-60
G-19577	55	3	9-8-59	10-7-59	5-9-60
G-19577	56	8	9-8-59	10-7-59	5-9-60

Subsequently, on November 30, 1959, Amerada tendered for filing additional proposed changes in rates reflecting renegotiated increases involving the above-identified rate schedules. By letter orders dated February 5, 1960, the Commission informed Amerada that these proposed renegotiated increased rates had been considered as superseding the previously filed and suspended favored-nation increased rates. For this reason the Commission terminated as moot the suspension proceedings in Docket Nos. G-19488, G-19489, G-19490 and G-19577. The latter renegotiated proposed changes in rates, among others, were suspended until June 1, 1960 by Commission order issued December 18, 1959, in Docket Nos. G-20390, G-20391 and G-20392.

On March 7, 1960, Amerada filed in Docket Nos. G-19488, G-19489, G-19490 and G-19577, separate petitions for rehearing and reconsideration of the Commission's letter orders dated February 5, 1960. In support of its petitions, Amerada states that the effect of the Commission's order considering the November 30, 1959 filings as superseding the prior filings was to suspend the prior filings for eight rather

than five months contrary to the provisions of Section 4(e) of the Natural Gas Act. Amerada further states that the Commission's order denies it procedural due process of law, is confiscatory, is discriminatory and denies it the equal protection of the laws, and constitutes an illegal impairment of the obligations of contract.

With regard to suspension proceedings under the Natural Gas Act the Commission's general policy and interpretation has been that the rate in effect prior to the suspension period continues in effect and shall not be changed during the suspension period. Amerada's November 30, 1959 filings proposed to change rates under suspension and, therefore, were subject to rejection. Instead of rejecting them, the Commission considered them as superseding the prior filings since such action was considered to be less onerous on Amerada. However, in view of Amerada's opposition to this action and consistent with the Commission's General Policy and interpretation under the Natural Gas Act, it is deemed necessary for the proper enforcement of the Act to rescind the Commission's prior permission to file the November 30, 1959 changes in rates and reject them without prejudice to their resubmittal; vacate the letter orders dated February 5, 1960; reinstate the suspension proceedings in Docket Nos. G-19488, G-19489, G-19490 and G-19577; and reinstate the above-designated supplements tendered for filing on August 31, 1959, and September 8, 1959.

Since the Commission is rejecting Amerada's November 30, 1959 filings, so much of the suspension proceedings involving those filings should be terminated as moot.

The Commission finds:

(1) It is appropriate in carrying out the provisions of the Natural Gas Act to grant Amerada's petitions for rehearing; vacate the Commission's letter orders dated February 5, 1960 in Docket Nos. G-19488, G-19489, G-19490 and

G-19577 and reinstate the suspension proceedings therein; reinstate Supplements Nos. 21, 4, 1, 2, 3, 5, 6, 3 and 8 to Amerada's FPC Gas Rate Schedules Nos. 1, 62, 69, 72, 27, 57, 31, 55, and 56, respectively; rescind the Commission's permission to file the changes in rates tendered by Amerada on November 30, 1959 involving Amerada's FPC Gas Rate Schedule Nos. 1, 62, 69, 72, 27, 57, 31, 55 and 56; and reject the filing of said changes in rates without prejudice to their resubmittal.

(2) It is further appropriate in carrying out the provisions of the Natural Gas Act to terminate the proceedings in Docket Nos. G-20391, G-20392, and so much of the proceeding in Docket No. G-20390 as pertains to Supplements Nos. 22, 7, 5, 4, 9, 2 and 3 to Amerada's FPC Gas Rate Schedule Nos. 1, 31, 62, 55, 56, 69 and 72, respectively.

The Commission orders:

(A) Amerada's petitions for rehearing are granted; the Commission's letter orders dated February 5, 1960 in Docket Nos. G-19488, G-19489, G-19490 and G-19577 are vacated and the suspension proceedings therein are reinstated; and supplements Nos. 21, 4, 1, 2, 3, 5, 6, 3 and 8 to Amerada's FPC Gas Rate Schedules Nos. 1, 62, 69, 72, 27, 57, 31, 55 and 56, respectively, are reinstated.

(B) The Commission's permission to file the changes in rates tendered by Amerada on November 30, 1959 involving Amerada's FPC Gas Rate Schedules Nos. 1, 62, 69, 72, 27, 57, 31, 55 and 56 is rescinded and the filing of said changes in rates is rejected without prejudice to their resubmittal.

(C) The proceedings in Docket Nos. G-20391, G-20392, and so much of the proceeding in Docket No. G-20390 as pertains to Supplements Nos. 22, 7, 5, 4, 9, 2 and 3 to Am-

erada's FPC Gas Rate Schedules Nos. 1, 31, 62, 55, 56, 69 and 72, respectively, are terminated. By the Commission.

J. H. Gutride
Secretary

(Seal)

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole and Arthur Kline.

	Docket Nos.
Amerada Petroleum Corporation	RI60-353
Amerada Petroleum Corporation (Operator), *et al.*	RI60-354

■ ■ ■

ORDER PROVIDING FOR HEARINGS ON AND SUSPENSION OF PROPOSED CHANGES IN RATES, AND ALLOWING INCREASED RATES TO BECOME EFFECTIVE SUBJECT TO REFUND.[1]

(Issued May 25, 1960)

The above-named Respondents have tendered for filing proposed changes in presently effective rate schedules for sales of natural gas subject to the jurisdiction of the Commission. In each filing, the natural gas is sold at 14.65 psia . . . The proposed changes are designated as follows:

[1] This order does not provide for the consolidation for hearing or disposition of the several matters covered herein, nor should it be so construed.

Docket Nos. R160-353

Docket No.	Respondent	Rate Sched. No.	Supp. No.	Purchaser and Producing Area	Notice of Change Dated	Date Tendered	Effective Date Unless Suspended	Date Suspended Until	¢ per Mcf: Rate in Effect	¢ per Mcf: Proposed Increased Rate	Rate in Effect Subject To Refund in Docket Nos.
R160-353	Amerada Petroleum Corp.	1	22	El Paso Natural Gas Co. (Eumont, Jalmat, etc., Flds., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802[3]	15.5	G-19488
R160-353	Amerada Petroleum Corp.	2	4	El Paso Natural Gas Co. (Bagley Fld., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802	15.5	G-19489
R160-353	Amerada Petroleum Corp.	31	[illegible]	El Paso Natural Gas Co. (Jalmat Fld., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802[4]	15.5	G-19577
R160-353	Amerada Petroleum Corp.	55	4	El Paso Natural Gas Co. (Eumont Fld., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802	15.5	G-19577
R160-353	Amerada Petroleum Corp.	56	9	El Paso Natural Gas Co. (Eumont Fld., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802	15.5	G-19577
R160-353	Amerada Petroleum Corp.	62	5	El Paso Natural Gas Co. (Bagley Fld., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802	15.5	G-19488
R160-353	Amerada Petroleum Corp.	69	2	El Paso Natural Gas Co. (Bagley Fld., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802	15.5	G-19488
R160-353	Amerada Petroleum Corp.	72	3	El Paso Natural Gas Co. (Bagley Fld., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802	15.5	G-19488
R160-354	Amerada Petroleum Corp. (Operator), *et al.*	57	6	El Paso Natural Gas Co. (Jalmat Fld., Lea Co., New Mexico)	4-22-60	4-25-60	6-1-60[2]	11-1-60	13.34802[3]	15.5	G-19490

[2] The stated effective date is the effective date proposed by Amerada.
[3] Includes 0.4467¢ per Mcf for compression, for some leases, deducted by Buyer.
[4] Includes 0.4467¢ per Mcf for compression deducted by Buyer.

* * *

In support of its proposed favored-nation rate increases, Amerada Petroleum Corporation (Amerada) states that the amendatory agreements were negotiated at arm's length and that as consideration for the price increases Amerada agreed to give up the favored-nation clauses of the contracts.

* * *

The proposed changes may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful.

The Commission finds:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon hearings concerning the lawfulness of the several proposed changes and that the above-designated supplements be suspended and the use thereof deferred as hereinafter ordered.

* * *

The Commission orders:

(A) Pursuant to the authority of the Natural Gas Act, particularly Sections 4 and 15 thereof, the Commission's Rules of Practice and Procedure and the Regulations under the Natural Gas Act [18 CFR, Chapter I], public hearings shall be held upon dates to be fixed by notices from the Secretary concerning the lawfulness of the several proposed increased rates and charges contained in the above-designated supplements.

(B) Pending hearings and decisions thereon, each of the above-designated supplements is hereby suspended and the use thereof deferred until the date indicated in the above "Rate Suspended Until" column, and thereafter until such further time as it is made effective in the manner prescribed by the Natural Gas Act.

(C) Neither the supplements hereby suspended, nor the rate schedules sought to be altered thereby, shall be changed until these proceedings have been disposed of or until the periods of suspension have expired, unless otherwise ordered by the Commission.

* * *

(E) Notices of intervention or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C. in accordance with the Rules of Practice and Procedure [18 CFR 1.8 and 1.37 (f)] on or before July 8, 1960.

By the Commission.

Joseph H. Gutride,
Secretary.

(Seal)

* * *

APPENDIX D

Section 4 of the Natural Gas Act (15 U. S. C. 717c) provides, in pertinent part, as follows:

"(c) Under such rules and regulations as the Commission may prescribe, every natural gas company shall file with the Commission, within such time . . . and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission,

or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of

proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

Section 16 of the Natural Gas Act (15 U. S. C. 717o.) provides, in pertinent part, as follows:

"The Commission shall have power to perform any and all acts and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours."

The Regulations of the Federal Power Commission (18 C.F.R. 1.1 *et seq.*) provide, in pertinent part, as follows

"Sec. 2.4. Suspension of rate schedules. The Com-

mission approved and adopted on May 29, 1945, the following conclusions as to its powers of suspension of rate schedules under Section 205 of the [Federal Power] Act:

■ ■ ■

(f) During suspension, the prior existing rate schedule continues in effect and should not be changed during suspension.

■ ■ ■

"Sec. 2.52. Suspension of rate schedules. The Commission, in approving and adopting the interpretation stated in Sec. 2.4, applied it also to the suspension of rate schedules under Section 4 of the Natural Gas Act."

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 564

AMERADA PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (Pet. 21-26) is reported at 293 F. 2d 572. The orders of the Federal Power Commission (J.A. 162-67, 177-83) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1961. A petition for rehearing, timely

filed, was denied on August 24, 1961. The petition for a writ of certiorari was filed on November 21, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission may reject a filing for an increased natural gas rate on the ground that it seeks to change the rate in effect during the period of suspension of an earlier increased-rate filing.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act and of the Commission's regulations are set forth in the petition at pages 46-49.

STATEMENT

Petitioner, an independent producer of natural gas, sells gas to El Paso Natural Gas Company under nine contracts involved in this case. To reflect the operation of "favored nation" clauses in these contracts, petitioner on August 31, 1959, and September 8, 1959, respectively, filed notices that its rates under six of these contracts would be increased to 13.34802¢ per Mcf effective October 1, 1959, and under the other three, effective October 9, 1959. On September 25, 1959, and October 7, 1959, the Commission ordered hearings to determine the lawfulness of each of the proposed increased rates and suspended their operation until March 1, and March 9, 1960, respectively. (Pet. 22-23).

About two months after these filings, on November 30, 1959, petitioner tendered for filing a proposed change in rate to 15.5¢ per Mcf under each of the nine contracts (Pet. 23; J.A. 127 [1]). These changes, which were the result of contract renegotiations, were sought to be made effective January 1, 1960, *i.e.*, prior to the expiration of the period of suspension then in effect for the earlier proposed rate increases (Pet. 23; J.A. 127). The Commission, on December 18, 1959, suspended the operation of the increased rates proposed in November until June 1, 1960 (Pet. 23). Thereafter, on February 5, 1960, it advised petitioner that the November 30 increased-rate filings had been considered as superseding the August 31 and September 8 filings and that therefore the proceedings relating to those suspended rates were terminated as moot (Pet. 23; J.A. 132-36).

Petitioner then moved the Commission to place in effect the first series of increased rates and on March 7, 1960, filed a petition for rehearing and reconsideration of the Commission's order of February 5, 1960, claiming a right to use these rates as of March 1 and 9, 1960, *i.e.* upon the expiration of five months after the effective date proposed (Pet. 23; J.A. 137-44, 151-156). In response to this petition, the Commission on April 5, 1960, reinstated the suspension proceedings with respect to the increased

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[1] Any discrepancies between the record references in this brief and those used by petitioner are apparently due to the fact that petitioner has used the pagination of the original Commission Record which is shown at the top of each page in the parties' Joint Appendix, while we have used the pagination of the Joint Appendix itself.

rates filed on August 31 and September 8, but rejected, without prejudice to their timely resubmission, the filings of November 30, 1959, which had previously been accepted for filing (Pet. 23; J.A. 162-67). The Commission explained that its general policy and interpretation under the Natural Gas Act was that the rate in effect prior to a suspension period remains in effect and should not be changed during the suspension period. Accordingly, it had regarded the November 30 filings as superseding the then-suspended earlier filings, since such action was considered to be less onerous to petitioner. But since petitioner insisted that the second filings were not intended to supersede the earlier ones, the Commission found it necessary to reject the later filings in order to effectuate the Act as interpreted by the Commission.[2] Petitioner's application for re-

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[2] F.P.C. Rules of Practice and Procedure, §§ 2.4(f), 2.52, 18 C.F.R. 2.4(f), 2.52 (Pet. 48-49), set forth a statement of general policy and interpretation that "the prior existing rate schedule continues in effect and should not be changed during suspension." F.P.C. Regulations under the Natural Gas Act §§ 154.94(a), 154.94(e)(2), 18 C.F.R. 154.94(a), 154.94(e)(2), applicable to independent producers which are "natural gas companies" within the meaning of the Act, provide, as does Section 4(d) of the Act, only for changes in presently *effective* rates.

The orders suspending the rates tendered for filing on August 31, 1959, and September 8, 1959, included the following standard language included in independent producer rate suspension orders (J.A. 119, 124):

> (C) Neither the supplements hereby suspended, nor the rate schedules sought to be altered thereby, shall be changed until these proceedings have been disposed of or until the periods of suspension have expired, unless otherwise ordered by the Commission.

hearing (J.A. 168-74) was denied May 27, 1960 (J.A. 175-76).

On April 25, 1960, petitioners refiled the increased rates which had been rejected on April 5, 1960, and requested that the filings be allowed to become effective, at least subject to refund, as of June 1, 1960, the date on which they would have become effective if the Commission had not found the two sets of increased rate filings incompatible as originally made (*e.g.*, J.A. 8, 178). By order dated May 25, 1960, the Commission set these rates for hearing and suspended their operation until November 1, 1960 (Pet. 23; J.A. 177-83). Petitioner's application for rehearing of this order (J.A. 184-206) was denied on July 21, 1960 (J.A. 207-211).

On petition for judicial review of the Commission's orders of April 5, 1960,[3] and May 25, 1960, the court of appeals affirmed, holding that the Commission had the authority to reject notices of increased rates, sought to be made effective during the period that the prior rate changes relating to the same sales were suspended (Pet. 24-26).

ARGUMENT

Petitioner's contention that the Commission exceeded its statutory authority in rejecting increased-rate filings intended to become effective during the statutory 5-month suspension period of earlier in-

[3] The lower court erroneously referred to this order in one place in its opinion as the order of "February 5". See Pet. 23.

creased-rate filings is plainly without merit. Nor is there any conflict between the decision in this case and that in *Willmut Gas & Oil Co.* v. *Federal Power Commission*, 294 F. 2d 245 (C.A.D.C.), petition for writ of certiorari pending, No. 506, this Term. The decision of the court below on the question before it was clearly correct; and in the absence of any conflict, the legal question presented is not of sufficient importance to warrant review by this Court.

1. The principal contention of petitioner, that the Commission has no authority to reject changed rate filings on the ground that these changes are intended to become effective during the period of suspension of a prior change in rates relating to the same sales of gas, ignores the terms, purpose, and history of the Act, particularly the suspension provisions of Section 4(e), and the well supported interpretation of those provisions by the Commission.

As the court below correctly held, the Commission has consistently declared its policy and its reading of the Act to be that the existing effective rate schedule is to continue in effect during the suspension period of a new filing. Indeed, more than 16 years ago the Commission formally interpreted its suspension powers and concluded, *inter alia*, that "[d]uring suspension, the prior existing rate schedule continues in effect and should not be changed during suspension." See Sections 2.4(f) and 2.52 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 2.4 (f) and 2.52 (Pet. 48-49). The court below properly gave consideration to this interpretation in ar-

riving at its construction of the Act. See *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. And the Commission's interpretation is fully supported by statements of this Court, by administrative interpretation of a like suspension provision in the Interstate Commerce Act, by the purpose of the grant of suspension power to the Commission, and by a reading of the provisions of Section 4(d) and (e) of the Act as a whole.

As this Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341, when a natural gas company files a notice of rate change, the Commission has the power under Section 4(e) of the Act "to preserve the status quo pending review of the new rate by suspending its operation" for five months after the new rate would otherwise go into effect. It seems obvious that the maintenance of the status quo means that, during the suspension period, the old rate is to continue in effect.

Moreover, since the language of the suspension provision of the Natural Gas Act was taken bodily from the Interstate Commerce Act, the prior construction of the latter is authoritative on the meaning of the suspension provision in Section 4 of the Natural Gas Act. See, *e.g.*, *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 807 (C.A. 4). That the Power Commission's construction, upon which the orders here challenged were based, is correct is supported by the fact that, for more than 20 years prior to the enactment of the Natural Gas Act, the Interstate Commerce Commission has construed the suspension provisions of the Interstate Commerce

Act in the same manner. See, *e.g.*, *Lumber to Texas Ports*, 44 I.C.C. 275, 276; *Guyton & Harrington Mule Co.* v. *Louisville & Nashville R.R. Co.*, 50 I.C.C. 546, 550.

By providing the Commission with the power to suspend new rates for five months, Congress not only hoped that the Commission might conclude its investigation of new, and possibly unjust or unreasonable, rates before permitting them to be charged and collected but, in addition, indicated that it would not be unduly burdensome on a natural gas company to continue collecting its old rate for six months (thirty days' notice and five months' suspension) after it had filed for a changed rate. Petitioner seeks to circumvent this legislative policy by insisting that it can file successive increased rates in such a way that some of its rates will remain in effect for less than six months. While the Commission believes that the five-month suspension period is, in fact, normally too short to permit completion of all phases of an increased rate proceeding under the Natural Gas Act,[4] petitioner's position, if accepted, would effectively curtail the usefulness of even the present five-month suspension period.

The facts of this case are illustrative. Petitioner here sought to put its second set of increased rates,

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[4] In its annual report to the Congress for the fiscal year 1961 (not yet transmitted or published) the Commission is recommending that Section 4(e) be amended to authorize the Commission, in its discretion, to extend the time of the suspension of a proposed change for a period of not more than six months beyond the original five months' suspension period.

which were filed November 30, 1959, into effect on January 1, 1960, or about two months prior to the expiration of the suspension of the first set of increased rates on March 1 or 9, 1960. Under petitioner's view, the second suspension would have expired on June 1, only three months after the effective dates in March 1960 of the rates first suspended. Even if the Commission is not able to conclude the investigation of the first set of increased rates during the suspension period, there is no reason why the seller should not be required to charge those rates for at least the minimal period of six months contemplated by the Act.

It should be noted that the Commission's policy and interpretation do not necessarily prevent a withdrawal of a suspended rate prior to the end of the suspension period so as to permit a new increased-rate filing. Indeed, as we have noted at pp. 3-4, *supra*, in this case the Commission originally construed the intent of petitioner's second set of increased-rate filings as a withdrawal. But petitioner thereafter declared that it had not intended to withdraw its first set of increased rates by filing the second set. Accordingly, the Commission properly rejected the second set because they were intended to change the status quo during the period of suspension.

Not only do petitioner's contentions fly in the face of the purpose of Section 4(e) to maintain the status quo during the period of suspension (see p. 7, *supra*), but they would not take into account the requirement

of Section 4(d) that changes may be made only in "schedules then in force." For they would mean that the rate filings expressly proposing to put 15.5¢ rates in effect on January 1, 1960, were intended to change the 13.34802¢ rates that had been suspended until March 1960, not the 10¢-11¢ rates (J.A. 127) which, on January 1, were the rates "then in force." [5]

2. There is no conflict between the decision in this case and that in *Willmut Gas & Oil Co.* v. *Federal Power Commission, supra.* The issue in the *Willmut* case was whether the Commission had the authority and the duty to reject an increased rate filing because the existing rates, which had become effective (subject to refund) at the close of the period for which they had been suspended, were still subject to hearing. The critical factual difference between the *Willmut* case and the present case is that the old rates in *Willmut* were effective at the time the superseding rates, which Willmut sought to have rejected, were filed. Accordingly, the court in *Willmut* had no occasion to deal with the sole issue presented

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[5] Petitioner's contention (Pet. 13-14) that "schedules then in force" means schedules on file, though suspended, not only fails to give effect to the phrase "in force" but in any event does not reflect its actions here. As its November filings provided and as would have followed had they been accepted, petitioner sought to make its second set of increases effective before the end of the previous suspension period so that the changes contemplated, at least in the first instance, had to be changes in the rates in force during the suspension period.

below, namely, whether the Commission can reject a filing which proposes to change the rate in effect *during a suspension period.*

Moreover, petitioner fails to recognize that the basis for both the Commission's position and the court's affirmance here was, as discussed above, that the authority to reject petitioner's second set of filings stemmed directly from the Commission's suspension power and is necessary to protect that power, while in *Willmut* the court found that the relief requested by petitioner was not necessary to effectuate the provisions of the Act. See our Brief in Opposition in the *Willmut* case, No. 506 this Term.

The contextual differences in the two cases not only point up the absence of any conflict in result but also negate the alleged conflict in the construction of the Commission's rule-making authority under Section 16 of the Act. In that respect, the court in the *Willmut* case held that the Commission had not erred in failing to promulgate a rule of a legislative nature to prevent the filing of any increased rates so long as prior rates remained subject to hearing. The court below, by contrast, found only that the Commission has the power under Section 16 to announce, in its rules and regulations, its interpretation of the Natural Gas Act—not that it could make legislative changes by rule making. Indeed, it affirmed the Commission's action because it agreed that the interpretation announced in its rules was correct (Pet. 25). There is clearly no inconsistency in these views.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 564

IN THE

Supreme Court of the United States

October Term, 1961

AMERADA PETROLEUM CORPORATION
Petitioner

VERSUS

FEDERAL POWER COMMISSION
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

Amerada Petroleum Corporation (Amerada), petitioner in the captioned case, hereby replies to the Brief for the Federal Power Commission in Opposition heretofore filed by the Solicitor General.

ARGUMENT

1. *The Conflict Between Circuits:* The contention of the Solicitor General that there is no conflict between the decision

of the Court of Appeals for the Tenth Circuit in the case at bar and that of the Court of Appeals for the District of Columbia in *Willmut Gas and Oil Company v. Federal Power Commission*, 294 F. 2d 245, is plainly incorrect. (Br. 10) It is based upon a factual difference which is wholly immaterial to the *fundamental issue* which is common to both cases.

In *Willmut*, the court held, following the guidance of this Honorable Court in *Mobile*[1] and *Memphis*,[2] that *"Section 4(d) of the Act does not give the Commission discretion to reject schedules of increased rates tendered by a natural gas company . . ."* (Emphasis added.) (Pet. 32) In contrast, the court below in the case at bar found in Section 4(d) "a clear token of Congressional implication" which, it held, clothed the Commission with authority to reject notices of rate increases filed by Amerada. (Pet. 25) *Willmut* teaches without equivocation that the Act *"does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates, or that it may summarily reject or disallow the new schedule without a hearing."* (Emphasis added.) (Pet. 32) Application of the rule of *Willmut* to the facts of the case at bar could only result in a decision *contrary* to that reached by the court below. Manifestly the factual difference in the two cases relating to the time when the rate increases in question were to be made, relied upon by the Solicitor General, is of no moment. What is

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[1] United Gas Pipeline Company v. Mobile Gas Service Company, 350 U.S. 332 (1956).

[2] United Gas Pipeline Company v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958).

important is the very basic conflict between the two decisions concerning the scope of the Commission's authority under Section 4 of the Natural Gas Act. It is this conflict which, Amerada submits, this Honorable Court should resolve.

The Solicitor General's position that there is no conflict between the decision below in the case at bar and that in *Willmut* concerning the scope of Section 16 of the Act, is, of course, based upon the validity of his position that there is no conflict in the two cases concerning the Commission's authority under Section 4, a position which we have shown is not tenable. The court below relied, in part, upon the Commission's "sweeping" administrative power under Section 16 of the Act in upholding the Commission's summary rejection of notices of rate changes filed by Amerada. (Pet. 2a) In *Willmut*, however, the court held that the "broad power" conferred by Section 16 *"does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service*, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes so that it may proceed under Section 4(e)." (Emphasis added.) (Pet. 34-35) The conflict between the two cases is clear and basic. It should be resolved by this Honorable Court.

2. *The Error of the Decision Below:* In support of the decision of the court below, the Solicitor General argues that rejection of notices of rate increases to be made while prior increases relating to the same sale are suspended is necessary to preserve the *status quo* pending review of the lawfulness of the

prior increases and to "protect" its power of suspension against subsequent increases in the interim. The short answer to this argument is that the Commission may maintain the *status quo* existing prior to any rate increase and may "protect" the effect of any suspension order by suspending each and every subsequent rate increase which may be made. Indeed, this is the course of procedure originally embarked upon by the Commission in the case at bar. (Pet. 4) The Commission is specifically given this power by the Act. Rejection of notices of rate increases is not, however, among those powers conferred upon the Commission by the Act and achieves no result other than to deprive natural gas companies of revenues to which subsequent investigation may show them to be lawfully entitled.

The Solicitor General correctly states that the Act contemplates that a natural gas company may be required to collect an old rate for six months *after it has "filed for" a changed rate.* (Br. 8) This restriction is specifically provided by Section 4(e) of the Act. This does not mean, however, that a natural gas company may be required to collect an old rate for six months *after it becomes effective* as the Solicitor General contends. (Br. 9) There is nothing in the Act which suggests that "locked in periods" (*ie.*, periods terminated by the taking effect of a rate change) may be no shorter than six months in duration. If, as in the case at bar, notice of a changed rate is filed before a prior change is made effective, there is nothing in the Act which allows the Commission to suspend the operation of the second change for more than six months after notice thereof is filed

or five months after it would otherwise have become effective.

Further, a prohibition of rate changes oftener than once every six months is not only unsupported by the Act, but would serve no public purpose. As shown in our petition, those restrictions on rate changes *specified* in the Act are the only ones necessary for the Commission to discharge its sole function of rate review. (Pet. 11-12) Thus the Commission may suspend *each* rate change and may impose an obligation to refund upon the collection of *each* change resulting in a rate increase, *regardless of their frequency*. The Commission may not arbitrarily impose restrictions not contained in the Act and wholly unnecessary to the purposes of the Act.

The reliance by the Solicitor General upon decisions of the Interstate Commerce Commission to support the action of the Federal Power Commission in the case at bar completely ignores the basic difference between the system of regulation established by the Interstate Commerce Act and that established by the Natural Gas Act. This difference in the two regulatory systems was explained by this Honorable Court in *Mobile* as follows:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. ***In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts.*** See *Armour Packing Co. v. United States*, 209 U.S. 56, 52 L. Ed. 681, 28 S. Ct. 428.

> The Commission in its brief recognizes this basic difference between the two Acts and notes the differing natures of the industries which gave rise to it. The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. *Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.*" (Emphasis added.) 350 U.S. 338, 339.

Inherent in a system of regulation founded upon contracts between buyers and sellers is the right of the parties to change the contract price from time to time as they deem necessary, subject, of course, to the power of the regulatory body to review the lawfulness of such changes. A restriction upon the frequency with which such changes may be made is not necessary to the reviewing function and is wholly inconsistent with such a regulatory system since the timing of rate changes is an important part of the "individualized arrangements" permitted. This, however, is not the case under the uniform tariff system established by the Interstate Commerce Act. A rule that a new tariff may not be filed while a prior tariff relating to the same service is suspended is entirely consistent with such a system. Hence,

interpretations of the Interstate Commerce Act are not of value in this case.

CONCLUSION

For all the reasons stated herein and in Amerada's petition, it is respectfully submitted that a writ of certiorari should issue in this case.

Respectfully submitted,

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